FOR ARGUMENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

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SUPREME COURT, U.S.

No. 77-888

JOSEPH VITEK, etc., et al.,

Appellants,

v.

CHARLES MILLER, WILLIAM GEORGE FOOTE, and LARRY D. JONES,

Appellees.

ON APPEAL FROM A THREE-JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

MEMORANDUM OF APPELLEE SUGGESTING THAT THE CAUSE IS NOT MOOT

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REFERENCES

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The appellee pursuant to the request of this Court files this memorandum to advise the Court of certain facts which, in the appellee's view, do not render this cause moot.

The court below enjoined the defendants from transferring the Plaintiff-Intervenor Larry D. Jones from the Nebraska Penal and Correctional Complex to the Lincoln

Regional Center at any time before his complete discharge from the custody of the State of Nebraska. On November 17, 1977, Larry Jones was granted what the state has termed a very limited parole to obtain inpatient psychiatric medical services at the Veterans Hospital in Danville, Illinois. The parole was limited to the Veterans Hospital only, and any termination of this program without prior approval from hospital staff or parole authorities would be grounds for parole revocation action (Exhibit C, Appellants' Brief on Mootness). It is the contention of the appellee that he is still subject to transfer under the statute found unconstitutional by the court below. His transfer to the Veterans Administration Hospital was for all practical purposes not a "parole" as the term is commonly understood. He presently has no freedom to seek employment, move from the psychiatric wing of the hospital, or perform any of the functions that one would normally expect of a parolee. This parole may have been a fiction, disquising the state's attempt to recommit Larry Jones to a mental hospital, while circumventing the injunction of the court below. Since the state appears to be still interested in committing Larry Jones to a mental hospital, it would appear that a spirited controversy still exists before this Court.

The appellee contends that he is still suffering a "continuing harm." As the appellants' brief on mootness (p. 2) indicates, his tentative discharge date is March 28, 1982, with a possibility of release on December 30, 1981.

His limited parole, as the appellant also contends, does not remove him from the custody of the State of Nebraska. And since he is still deemed subject to the custody of the state, he is still subject to transfer under the statute found unconstitutional by the court below should the order of the court below be vacated. The order enjoins the state from transfer until ". . . complete discharge from the custody of the State of Nebraska on the Criminal Sentence which he is now serving. . . ." (Jurisdictional Statement, App. 2). As was earlier suggested, the limited parole has in effect allowed the state to recommit Larry Jones to another mental hospital. This is clearly a present and continuing injury.

There also exists the possibility that Larry Jones may have his parole revoked. If his parole were revoked after this Court had mooted this cause and vacated the judgment below, he would be forced to bring a subsequent lawsuit to prevent a transfer to the Lincoln Regional Center. This would cause useless expenditure of judicial resources.

In the case of Carroll v. President & Commissioners, 393 U.S. 175 (1969) a lower court had enjoined a political party from holding rallies for ten days. Although the order expired before the case reached this Court, the controversy was not deemed to be moot, because an affirmance of the decision by a lower appellate court might have an effect on the continued activities of the political party. In the case of Super Tire Engineering Co. v. McCorkle, 416

U.S. 115 (1974), this Court found not to be moot a controversy over a state's policy of providing welfare assistance to striking workers, because the decision would have an adverse effect on employers' future bargaining relationships with their employees, even though the immediate strike had ended.

In both of these cases a finding of a current controversy seemed to be based upon an expectation that a course of governmental conduct would continue. Surely the appellee's claim of a present injury in the case at hand is more injurious to his present well-being than the plaintiffs' in McCorkle and Carroll. The state has also indicated they would return to their earlier conduct, but for the injunction of the court below.

The appellee in the case at hand is also able to demonstrate injury which has arisen from the collateral consequences of the state's completed course of action in transferring him to a state mental hospital.

This Court, in criminal cases, has often proceeded to adjudicate the merits of cases even though the prisoners have already been released. The basis for such findings has rested on the fact that collateral consequences of criminal convictions still existed. In the case of Sibron v. New York, 392 U.S. 40, 55-56 (1968), this Court found that a possibility under state law that the prisoner's conviction could be later used to impeach his character at a later trial, should it ever be put to issue, prevented the case from being mooted.

In Ginsberg v. New York, 390 U.S. 629, 634 n. 2, it was noted that an obscenity conviction might result in the revocation of a license required by municipal law. The case was found not to be moot because of this possible collateral consequence. A similar holding is found in Morgan v. United States, 346 U.S. 502, 512-513 (1953), where it was noted that the results of a conviction may still persist, even though the prisoner had been released. In Fiswick v. United States, 329 U.S. 211, 221-222, the case was not deemed moot as the conviction of an alien created a possible hazard of later deportation and problems with later requirements for naturalization. In Pollard v. United States, 352 U.S. 354, 358 (1956), the Court indicated that the mere possibility of collateral consequences from the conviction was sufficient for the Court to treat the merits of the case. The effect of the conviction on loss of employment was noted in Street v. New York, 394 U.S. 579 (1969).

In Benton v. Maryland, 395 U.S. 784 (1969), a defendant was convicted of burglary and larceny, for the same act, and challenged the larceny conviction as being violative of the double jeopardy clause of the fifth amendment. Although the sentences ran concurrently, this Court held that the additional conviction on the defendant's record would most likely result in adverse consequences, therefore saving the case from mootness.

The Court, by its refusal to moot criminal cases which might involve subsequent civil disabilities, is in

essence taking note of the stigma which might attach to a convicted person. Likewise, Larry Jones has also suffered possible collateral consequences by his transfer to a state mental hospital. He has also suffered the stigmatizing effects of being labelled mentally ill and may suffer additional disabilities (see Brief of Appellee, pp. 27-28). If this Court can find continuing injury predicated on collateral consequences of a criminal conviction, it can surely by analogy make the same finding for confinement in mental hospitals.

The injury suffered by the plaintiff, if not found to be continuing by this Court, may well fall within the category of harm "capable of repetition, yet evading review", Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 515 (1911). In Southern Pacific, supra., the I.C.C. issued a two-year injunction to the railroad prohibiting them from giving certain rate advantages. The order expired before the case reached the Supreme Court. The Court noted the continuing nature of the controversy and suggested that the I.C.C. might issue similar orders in the future. The Court reasoned that its jurisdiction ought not to be defeated by short-term orders which would never, because of their short duration, ever be capable of review by the Court. Likewise, in the case at hand, the State of Nebraska, by paroling Larry Jones, could attempt to moot the controversy in the Supreme Court and have the judgment below vacated. If the same issue were raised by Larry Jones or another litigant, at a later date, each time the

issue would reach this Court, the state could parole the individual involved. Therefore, the state could continue repeating its practices pursuant to Neb. Rev. Stat. 83-180(1) (Reissue 1976), but could continually evade review by this Court.

If this Court should find that the defendants have effectuated voluntary cessation of their allegedly illegal conduct, this alone will not deprive this Court to hear and determine the case. In the case of United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953), the Court indicated that the voluntary cessation of the conduct did not make the case moot:

> . . . The defendant is free to return to his old ways. This together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. . . .

The Court went on to state that the burden of showing there exists no reasonable expectation of the wrong being repeated is a heavy one.

The public interest in the State of Nebraska of resolving this dispute is present, as is evidenced by the fact that the appellants additionally argue that this cause is not moot.

In the case of Roe v. Wade, 410 U.S. 113 (1973), a pregnant woman challenged state anti-abortion laws. The Court, although the pregnancy was terminated during the litigation, found the case not to be moot, because the abortion issue would otherwise be capable of repetition

yet evading review. The Court stated at p. 12:

> If that termination [pregnancy] makes a case moot pregnancy litigation seldom would survive beyond the appellate state, and appellate review would effectively be denied. Our law should not be that rigid.

Although the case presently before the Court is not proceeding as a class action, the cause was filed as such. The plaintiff sought to characterize the class as all individuals who had been transferred to the Lincoln Regional Center and all who are subject to transfer under the statute in question. This would include all prisoners at the Nebraska Penal and Correctional Complex and Nebraska State Reformatory. Although the case is not presently certified as a class action, the appellee Larry Jones certainly represents a large group interest. If he is not allowed to pursue this action, this will only force relitigation of the same issues by other members of the group.

The case at hand is distinguishable from DeFunis v. Odegaard, 416 U.S. 312 (1974). In DeFunis the issue of mootness did not depend upon the voluntary cessation of the admission practices, but upon the fact that the law student was free to finish his course of study. Larry Jones, to this date, has not been given freedom from the custody of the State of Nebraska.

The present case is also distinguishable from Preiser v. Newkirk, 422 U.S. 395 (1975). In Preiser, the prisoner was to be ". . . eligible for parole within a matter of days. . ."

Preiser, supra., pp. 401, 403. We can only assume that this parole was not of the limited nature effectuated in the case at hand. The Court specifically found at p. 403:

> Any subjective fear Newkirk might entertain of being again transferred, under circumstances similar to those alleged in the complaint or of suffering adverse consequences as a result of the 1972 transfer is indeed remote and speculative and hardly casts that continuing and brooding presence over him that concerned the Court in Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 122 (1974).

Alternatively, should this Court find that an actual case or controversy does not exist, we respectfully request that the judgment of the court below be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief was served upon the opposing counsel of record, Mr. Melvin Kammerlohr, by mailing a copy, first-class postage prepaid, to his address, 2115 State Capitol, Lincoln, Nebraska 68509.

Dated this 15 day of April, 1978.

Thomas A. Wurtz
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